

**UNITED STATES OF AMERICA**  
**BEFORE THE MERIT SYSTEMS PROTECTION BOARD**

In the matter of:  
VINCENT T. OLIVER

v.

DEPARTMENT OF TRANSPORTATION,

} Docket No.  
M-80-9 (IN)

**OPINION AND ORDER**

By order dated October 15, 1979, the Board assigned to Administrative Law Judge John H. McCarthy the three appeals pending in the matter of Vincent T. Oliver, for processing pursuant to 5 C.F.R., Chapter 772. The appeals involve a 30-day suspension, an indefinite suspension, and his removal. Each of these actions was effected by the Department of Transportation.

On November 7, 1979, appellant filed a motion for the disqualification of Judge McCarthy as presiding official in this case. Judge McCarthy denied this motion in an Order dated November 19, 1979. On November 26, 1979, appellant, through counsel, filed a "Motion for Certification of Interlocutory Appeal." The motion for disqualification was expanded by letters from the appellant dated November 26, and December 11, 1979.

Each of the actions which was assigned to Judge McCarthy for processing was "pending," as that term is defined in section 1201.191(b) of the Board's regulations, on January 11, 1979, the effective date of the Civil Service Reform Act, Public Law 95-454, 92 Stat. 1111 et seq. (October 13, 1979). As such, the appeals from those actions are governed by the regulations of the Civil Service Commission which were in effect prior to the implementation of the Act, 5 C.F.R. Parts 752 and 772, rather than by the regulations promulgated by the Board for post-Reform Act cases. There was no provision in the applicable regulations for the certification of an interlocutory appeal. However, inasmuch as Judge McCarthy granted appellant's motion for the certification of this matter as an interlocutory appeal, the Board has considered the matters presented in order to make a determination on the motion for disqualification.

As set forth in the November 7, 1979 motion, appellant alleges that the presiding official is biased against him and in favor of the agency. Specifically, he states that the presiding official:

failed to rule on his motion for reversal or adjudication on the record during a two week period because the presiding official was out of town;

set a schedule for the submission of briefs, disregarding appellant's statement that he did not intend to submit further briefs and his request that the record close on October 31, 1979;

falsely stated that a copy of an October 31, 1979 letter from the agency's representative was served on the appellant and failed to inform the appellant of receipt of that letter;

extended the courtesy to the agency's representative of informing him of his right to review the record of the case, without doing the same for appellant; and,

failed to forward a copy of the October 31, 1979 agency letter to appellant.

The November 26, 1979 letter, referenced above, asserts that appellant has been the victim of a pattern and practice of systemic discrimination, as supported by the objections specified immediately above and, insofar as is relevant here, the following:

the presiding official's abuse of authority in denying the motion for summary reversal;

the assistance given to the agency's representative in reproducing document from the appeal record;

harassment by the presiding official which allows him selectively to enforce his ruling that he will not consider any submissions not filed with the requisite number of copies; and,

tampering with the record by "sterilizing" it through the preparation of an index which may not be complete.

In addition, this letter notes that appellant is black, while the presiding official, his staff, and the agency's representative are Caucasian.

The Motion for Certification of an Interlocutory Appeal itself raises seven reasons for the certification of the appeal. Inasmuch as Judge McCarthy certified this appeal to the Board on December 6, 1979, these arguments will not be considered further herein. Additionally, six arguments are advanced for granting the motion for disqualification in the motion for certification. These are that:

the decision of the presiding official disregarded evidence which clearly shows bias and preferential treatment;

the motion is based on specific factual arguments and evidence;

the denial is arbitrary and capricious;

to sustain the denial is further evidence of the Board's unwillingness to strike down systemic discrimination;

the denial constitutes gross negligence and abuse, and,

the denial verifies the reasons listed in the October 4, 1979 motion for summary reversal.

In his December 11, 1979 letter, appellant submitted a "response" to the presiding official's certification of the interlocutory appeal (Certification), in which he contends that the nature of the Certification, itself, reflects personal bias and prejudice, systemic institutional discrimination, and the perpetuation of such practices. He refers to eight matters in support of these assertions, which take issue with the language used by the presiding official in drafting the Certification. In addition, he states that the presiding official failed to follow procedures, in that the Certification "showed that appellant's counsel had not been served with a copy." With respect to this last matter, there is no procedure specifically applicable to this situation which Judge McCarthy failed to follow. Absent a showing that appellant's counsel did not receive a copy of this document, we will give this argument no further consideration. Similarly, because the Board has reviewed the entire record, as relevant, in deciding this appeal, the specific terms of the Certification will have no bearing on this adjudication. Further, we note that the decision of the presiding official to certify an interlocutory appeal, although applicable regulations do not provide for such a review, in itself belies the appellant's assertion of bias.

Appellant also requested in the letter of December 11 that a stay be granted pending decision of the interlocutory appeal. There has been no evidence submitted which indicates that Judge McCarthy abused his discretion in finding that no additional burden would result if the initial decision is issued after the Board decides the interlocutory appeal.

It is well settled that the legal framework for reviewing motions for disqualification is rather limited. In making a claim of bias or prejudice, appellant must overcome a presumption of honesty and integrity which accompanies administrative adjudicators. *Ash Grove Cement Company v. FTC*, 577 F.2d 1368 (9th Cir., 1978), *cert. den.*, 99 S. Ct. 571 (1978) and *Withrow v. Larkin*, 421 U.S. 35 (1975). There must be a substantial showing of personal bias to disqualify a hearing officer, *Roberts v. Morton*, 549 F.2d 158 (10th Cir., 1976), *cert. den.*, 434 U.S. 834 (1977). See also *Converse v. Udall*, 262 F. Supp. 583, (D. Or. 1966), *aff'd* 399 F.2d 616 (9th Cir., 1968), *cert. den.*, 393 U.S. 1025 (1969), and *Association of National Advertisers, Inc. v. Federal Trade Commission*, No. 79-1117 (D.C. Cir., December 27, 1979). And, of course, the mere fact that a hearing officer has ruled against a party in the past cannot be the basis for a claim of personal bias, *NLRB v. Donnelly Garment Company*, 330 U.S. 219, 236-237 (1947). See also *Marcus v. Director, Office of Workers Compensation Program*, 548 F.2d 1044, 1051 (D.C. Cir., 1976). The Board has

recently issued a decision applying these standards to challenges to presiding officials of this agency. *In the matter of John W. King*, 1 MSPB 144 (1979).

Because each of the six arguments in support of the motion for disqualification which was presented in the "Motion for Certification of an Interlocutory Appeal" was conclusory, they are of little use to this Board in ruling on the motion. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad, Inc.*, 380 F.2d 570 (D.C. Cir., 1967), *cert. den.*, 389 U.S. 327 (1967). However, the Board has carefully reviewed the motion in light of the other allegations noted above.

Because the majority of appellant's arguments take issue with the presiding official's actions in processing appellant's appeals, thorough consideration has been given to 5 C.F.R. 772.301 et seq., which sets forth the procedures applicable to this case, in order to determine whether his actions were consistent with those regulations. The regulations provide general guidance concerning the manner in which appeals cases are developed and adjudicated, and authorize the presiding official to take actions which will assure the orderly processing of cases to timely and equitable conclusion. Section 772.305 provides that it is the responsibility of the parties to submit all evidence relevant to the case, and section 772.308(a) provides for the closing of the record only after the parties to the appeal have had a full opportunity to present "any and all relevant and material evidence."

In consideration of this regulatory authority, the Board finds that the presiding official's actions in setting a schedule for the submission of briefs, thereby disregarding appellant's request to close the record on October 31, 1979, and his action in denying the motion for summary reversal constitute the proper exercise of his duly authorized functions.

The regulations of the Civil Service Commission made no reference to a required number of copies of any pleadings submitted. However, the presiding official's action in advising both parties by letter of November 21, 1979, that their submissions must be filed with three copies is consonant with his authority to direct the proceedings. The record fails to reflect an uneven application of this requirement by the presiding official, and the mere conjecture by appellant that such action could be taken in the future fails to present the Board with any evidence to support the motion for disqualification.

With respect to the presiding official's failure to rule on appellant's motion for summary reversal or adjudication on the record during a two-week period while the presiding official was out of town, the record reveals that in his October 26, 1979 letter, the presiding official stated that he wanted to ascertain whether

any procedural matters remained to be considered if the motion for decision without hearing were to be granted. He, therefore, requested that appellant inform him whether any such matters had to be decided prior to decision on the motion. The Board finds that this action evidences thoughtful reflection by the presiding official and a desire to assure that the appeal is processed with full consideration given to the rights and previous motions of the parties. Appellant's conclusory statement that this action constitutes bias simply provides no basis for the finding he seeks. The fact that a ruling, properly made under the Board's regulations, may be contrary to the wishes of one of the parties does not constitute personal bias.

Several allegations have been made in connection with letters dated October 31, 1979, which were submitted by the agency's representative to the presiding official. Appellant contends that the presiding official falsely stated that such a letter was served on appellant, and that the presiding official failed to forward a copy to him. The record reflects that two letters dated October 31, 1979 were submitted by the agency's representative. One contained a notation that a copy had been sent to appellant and his attorney, the other noted a copy to appellant's attorney. The presiding official's letter of November 5, 1979, addressed to the agency's representative, states that the representative's October 31 letter had been received along with the material which was submitted with that letter. The Judge's letter also notes that the agency representative had sent copies of his October 31 letter to appellant and his attorney.

The Board finds that this statement provides no support for appellant's allegation of bias, as it is a correct summary of the circumstances. While one of the October 31 letters was not sent by the agency representative to the appellant, the only letter of October 31 which enclosed other material clearly shows that a copy was sent to the appellant as well as his counsel. If, in fact, the enclosures were not sent to appellant, the letter fails to reflect that. Because of this, there was no apparent need for the presiding official either to acknowledge receipt of the letter to appellant or to forward a copy of it to him. It is noted, however, that upon being informed that appellant had not received both letters dated October 31, the presiding official mailed a copy to appellant on November 21.

The appellant also alleges that the presiding official has shown his bias and prejudice by unfairly providing the agency's representative with an opportunity to review the appeal record, without informing him that he could do the same, and by reproducing documents from the appeal record for the representative. The record shows that the presiding official suggested to the agency representative, in a letter addressed to him on November 5, 1979, a

copy of which was forwarded to the appellant and his attorney, that he might want to review the file. This letter was in response to the representative's suggestion that there might be documents in the record which he had not seen. The Board finds that this correspondence does not evidence bias on the part of the presiding official. Rather, it reflects an honest effort to accommodate the agency's representative, while fully informing appellant that this suggestion was being made. The record also shows that by letter of November 21, 1979, appellant was specifically informed by the presiding official of his right to review the file, and that on November 28, he did so. During the course of appellant's review of the record, documents which were requested by him were also reproduced and provided to appellant. The Board finds, therefore, that these actions do not reflect unequal treatment of the parties, much less justify the disqualification of the presiding official.

Appellant has also alleged that the presiding official tampered with the record by preparing an index, and that this could constitute sterilization of the record if certain records were omitted. Once again, the Board finds that appellant has not submitted any evidence that the presiding official did, in fact, "sterilize" the record by removing any documents, and that he has provided us with nothing more than mere speculation that such action could be taken. We find that the preparation of an index was an action taken for administrative convenience with no effect on the substantive rights of the parties. Further, the fact that appellant and the agency's representative personally examined the record, and that they were both provided with a copy of the index rules out the possibility of unilateral action on the part of the presiding official to remove any document from the record. We can find no evidence of bias in this regard.

In summary, the Board has carefully considered all of appellant's allegations concerning prejudice and bias, and is of the opinion that, singly and collectively, no grounds have been set forth to demonstrate that Judge McCarthy is biased or prejudiced against the appellant and should be disqualified from deciding his appeals. We find that none of the conclusory allegations contained in the motion for certification provide evidence of the nature necessary to form the basis for a finding of bias or the disqualification of the presiding official. The statement that the presiding official, both members of his staff, and the agency's representative are Caucasian, while appellant is black, is also nothing more than an acknowledgement of fact, and is not evidence of bias. Finally, we note that the thrust of many of appellant's arguments is directed toward his denunciation of systemic, institutionalized discrimination which, he alleges has pervaded his case. While the Board shares appellant's concern for eliminating such discrimination

wherever it exists, we categorically reject his implication that a fair adjudication of his appeal is not possible before this Board. Specifically, such a broad, general allegation is not a basis for the disqualification of a particular presiding official, and as found above, appellant has presented no evidence to support his motion with respect to Judge McCarthy.

Accordingly, we conclude that appellant has failed to present to the Board evidence to warrant the disqualification of the presiding official assigned to his case by Order of October 15, 1979, and it is ORDERED that:

1. The motion of appellant Oliver and his attorney to disqualify Judge McCarthy is denied.
2. The case continues to be assigned to Judge McCarthy for processing and adjudication.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *January 21, 1980.*